Supreme Court, U.S.
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NO. 91-1522

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. HABERSTROH,
District Attorney of Blair
County, Pennsylvania, et al.,
Petitioners

v.

WAYNE PAUL BURKETT,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

SUPPLEMENTAL BRIEF BY RESPONDENT, WAYNE PAUL BURKETT, PURSUANT TO RULE 15.7 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

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ARGUMENT

Respondent, Wayne Paul Burkett (Burkett) files this Supplemental Brief to call to the Court's attention the case decided by this Court, United States v. Williams, No. 90-1972, decided by this Court on May 4, 1992, 60 U.S.L.W. 4348, which decision was filed after Respondent's last filing in this Court.

In Williams, this Court took up the question whether the Petitioner had waived his right to present the issue in this Court because it had not raised or pressed the issue below. This Court ruled that the Petitioner, the United States of America, had not waived its rights to present the issue in this Court because the government had not reversed its position in this Court from the position it had taken in the Court of Appeals, but had merely acknowledged that it had to follow the binding precedence of an earlier case, where the United States had challenged the rule originally laid down by the Court of Appeals. This Court said:

> In short, having reconsidered the precise question we resolved when this petition for review was granted, we again answer it the same way. It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court, where, although the petitioner not did contest the issue in the case immediately at hand, it did so as a party to a recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of the precedent . . . .

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In contrast, here, the District Attorney not only did not contest the earlier precedent in which the Court of Appeals laid down the rule that the Sixth Amendment applies to the time between conviction and sentence but the District Attorney actually embraced the rule, adopted it as correct and acknowledged that a violation of the rule could be the basis of discharge from custody of the Petitioner. See, Burkett v. Cunningham, 826 F.2d 1208, 1226, n.41 (3d Cir. 1987)(Burkett I). The references to where the Respondent in all three cases conceded the correctness of the rule and adopted that rule as its own are set forth in Burkett's Brief and Appendix filed in opposition to the petition for certiorari in this Court on April 17, 1992. Nor did the District Attorney contest the ruling of the Court of Appeals in either of the subsequent cases brought by Burkett that were the subject of the same rule in the Court of Appeals. See, Burkett v. Fulcomer, decided August 7, 1990, in unpublished opinion (Burkett II) and Burkett v. Fulcomer, 951 F.2d 1431 (3d Cir. 1991) (Burkett III).

In contrast to the Williams case, the Petitioner here has reversed its position and attempts to now challenge a principle it conceded and embraced in all the prior cases between the identical parties. In these circumstances, the Petitioner should be estopped from reversing its position in this Court.

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Petitioner District Attorney attempts to ameliorate the concessions it has made in the lower courts in all prior cases by asserting that the District Attorney was not the District Attorney at the time those prior cases were litigated. See, footnote 2 in Petitioner's Reply to Brief in Opposition to Petition for Certiorari, page four, footnote two. District Attorney William J. Haberstroh was first sworn in on January 6, 1986, as District Attorney for Blair County. His signature appears in Volume III at page 686 of the Appendix of Burkett v. Fulcomer, 826 F.2d 1208 (3d Cir. 1987) filed in July 1987 at Court of Appeals No. 91-3040, on documents as consenting to amending the caption on appeal in the Supreme Court of Pennsylvania filed at 974 Pittsburgh 85 dated January 14, 1986. Haberstroh's name also appears on the following pages of Volumes III, IV and V filed as an Appendix in Burkett v. Fulcomer, at No. 91-3040 in the Court of Appeals as follows:

Volume III -- pages 643, 659, 684, 686, and 692.

Volume IV -- pages 769, 778, 815 and 842.

Volume V -- pages 964, 993, and 1039.

Thus, it would be appear that District Attorney Haberstroh was in charge of the litigation when the case was appealed to the Court of Appeals in Burkett I, decided July 31, 1987, which set the precedent that he adopted and conceded thereafter in Burkett II and Burkett III.

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If this Court were to grant the Petition in this case, even though the Petitioner did not contest the ruling in three cases below between the same parties, and even though the Petitioner embraced and conceded the rule in the last case before the Court of Appeals, not only would this Court violate the rule it recently announced in Williams, but would also set a precedent that would impugn the finality of all future judgments by the Courts of Appeals. A party could adopt the ruling in the lower court in one case; concede its application in subsequent cases between the same parties in the Court of Appeals, and, then attack the ruling in this Court, when it was dissatisfied with the outcome. Thus if this Court would grant the petition in this case, this Court would allow Petitioners to sandbag both its opponents and the Court of Appeals, where if the rule were challenged, the parties or the Court of Appeals could have relied on alternative or other grounds for its decision. Here it is conceded by the Petitioner that the Court of Appeals could well have decided this case solely on the ground of a violation of the Due Process Clause. (See Petitioner's Reply Brief in this Court at page 7.)

Burkett would assert that if this Court were to accept and grant the Petition in this case, it would set the case at odds with the recent cases in which this Court has emphasized the finality of judgments in habeas corpus cases. See, for example, Coleman v. Thompson, 111 S.Ct. 2546 (1991).

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Certainly the waiver rules should be applicable when the District Attorney, representing the Commonwealth, attempts to attack a ruling that he adopted and conceded, as when any other party would attempt such a reversal of position.

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CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari to review the decision below be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Brief by Respondent, Wayne Paul Burkett, Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States was mailed this 27th day of May, 1992, to the following:

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